

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTINE A. DUGGAN,

No. C 11-02176 WHA

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR ATTORNEY'S FEES**

Defendant.
_____ /

INTRODUCTION

In this social security appeal, plaintiff moves for attorney's fees and expenses under the Equal Access to Justice Act. For the reasons stated below, plaintiff's motion is **GRANTED IN PART**.

STATEMENT

The facts have been set forth in a prior order (Dkt. No. 27). Briefly, this action was initially filed for disability benefits in March 2005. The administrative law judge found that plaintiff was not disabled despite having impairments of lumbar degenerative disc disease, polysubstance abuse in reported remission, and right upper extremity strain. After the appeals council denied plaintiff's request for review, plaintiff filed an appeal here (Dkt. No. 27).

Prior to the appeals council's denial, plaintiff had filed a separate application for disability with Disability Determination Services Department, a state agency that determines

1 disability for the Social Security Administration. The DDS physicians opined that plaintiff's
2 impairments were consistent with spinal impairments listed in Section 1.04A. The DDS
3 estimated the date of plaintiff's disability to be February 27, the day after the ALJ's initial
4 decision that plaintiff was not disabled, so as not to directly conflict with the ALJ's
5 determination of non-disability (Dkt. No. 27).

6 Because of the inconsistencies between the ALJ and DDS determinations, the parties
7 stipulated to remand. On the stipulated remand, the ALJ was tasked with reconciling its initial
8 denial with the subsequent allowance by the DDS. The ALJ again found that plaintiff was not
9 disabled between March 2003 and February 2007 (Dkt. No. 27).

10 Plaintiff again appealed. Again the action was remanded. Plaintiff now moves for
11 attorney's fees and expenses pursuant to the EAJA. Plaintiff seeks \$12,111.36 in attorney's fees
12 and expenses. Defendant contends that fees and expenses should not be awarded because it was
13 substantially justified in its conduct, or alternatively that the requested amount is excessive and
14 unreasonable. This order follows briefing and a hearing. Plaintiff's counsel failed to appear at
15 the hearing.

16 ANALYSIS

17 1. ENTITLEMENT TO FEES AND EXPENSES.

18 The Equal Access to Justice Act provides in pertinent part that "a court shall award
19 to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil
20 action . . . including proceedings for judicial review of agency action, brought . . . against the
21 United States . . . unless the court finds that the position of the United States was substantially
22 justified or that special circumstances make an award unjust." In order for a fee award to be
23 granted, (1) a party must "prevail" in a civil action, and (2) the government's position in the
24 action, including the underlying administrative proceedings, must have been "not substantially
25 justified."

26 A party "prevails" for the purposes of the EAJA if the denial of its benefits is reversed
27 and remanded, regardless of whether benefits ultimately are awarded. *Gutierrez v. BARNHART*,
28 274 F.3d 1255, 1257 (9th Cir. 2001). The government bears the burden of proving that its

1 conduct was substantially justified. Our court of appeals has held that this standard is one of
2 reasonableness, and the government must establish that its conduct “had a reasonable basis both
3 in law and fact.” *Sampson v. Chater*, 103 F.3d 918, 921 (9th Cir. 1996).

4 The government does not contest that plaintiff was a prevailing party for the purposes of
5 the EAJA. The government so concedes and this order agrees that plaintiff was the prevailing
6 party (because the government stipulated to a remand).

7 The government, however, contends that plaintiff is not entitled to fees and expenses
8 because its position was substantially justified. The government argues that on the stipulated
9 remand the ALJ properly considered the evidence prior to February 2007 including evidence
10 from the DDS physicians and the medical expert’s opinion. The government also argues that
11 it was substantially justified in defending the ALJ’s decision. This order disagrees.

12 *First*, the ALJ did not adequately explain why plaintiff was non-disabled under
13 Section 1.04A prior to February 27. This was required by the stipulated remand order to
14 reconcile the inconsistencies in the evidence. This was a major issue because there were no
15 medical reasons given for the DDS’ decision to commence benefits on February 27. It was
16 simply the earliest date that benefits could commence due to the ALJ’s unfavorable February 26
17 decision. Failure to adequately address this issue was erroneous (Dkt. No. 27).

18 *Second*, the ALJ did not address Section 1.04A at all. This was surprising because
19 the DDS physicians opined that plaintiff’s impairments medically equaled the disabling spinal
20 impairment listed in Section 1.04A. “The ALJ’s lack of discussion regarding the DDS
21 physicians’ clinical findings, shows that the ALJ did not adequately reconcile the DDS physician
22 determination of disability . . .” (Dkt. No. 27).

23 For the reasons mentioned above, the ALJ failed to follow the stipulated remand order
24 to reconcile the inconsistencies in the evidence. This order finds that the government’s position
25 was not substantially justified because the ALJ’s decision and the government’s defense thereof
26 was not reasonably based in law and fact.

1 **2. REASONABLENESS OF FEES AND EXPENSES.**

2 Fees awarded pursuant to the EAJA must be reasonable. The party requesting the fee
3 award bears the burden of proving that its request is reasonable. Any task that would not be
4 billed to a client may not be billed to an adversary under the EAJA. “Excessive, redundant,
5 or otherwise unnecessary” hours must be excluded. *Hensley v. Ekerhart*, 461 U.S. 424, 437
6 (1983). Clerical tasks, even when performed by an attorney or paralegal, may not be billed to
7 an adversary. *Missouri v. Jenkins*, 491 U.S. 274, 288 n. 10 (1989). Any fees awarded pursuant
8 to the EAJA must be paid to the plaintiff, not to the plaintiff’s attorney. *Astrue v. Ratliff*,
9 130 S. Ct. 2521, 2524 (2010).

10 Surveys of several dozen social security actions have been conducted to find an
11 appropriate range for hours billed. *See Lobato v. Astrue*, 2012 WL 3155699, *3 (N.D. Cal.
12 Aug. 2, 2012) (Spero, J.) (Citing *Patterson v. Apfel*, 99 F. Supp. 2d 1212 (C.D. Cal. 2000)
13 (Wistrich, J.)). The most appropriate range seems to be between twenty to forty hours billed
14 in a standard social security action. *Ibid.* Additionally, an “in-house survey performed by
15 Chief Judge Carl Rubin of the Southern District of Ohio and encompassing seven years of
16 data . . . found that the average number of hours asserted in the fee petition was 37.3.” *Ibid.*
17 (quotations omitted).

18 The government contends that the amount sought for fees and expenses is unreasonable.
19 Specifically, the government challenges the 74.8 hours billed by plaintiff’s counsel and not the
20 hourly rate requested by plaintiff. The government also argues that the billed entries include
21 clerical tasks which are not recoverable.

22 It must first be noted that the government lumps together all attorney’s fees requested
23 including those for the instant motion. This order finds that 67.6 hours were spent on the appeal
24 action and 7.2 hours were spent on the instant motion requesting EAJA fees. This order first
25 addresses the hours billed for the appeal action and then the hours billed for the instant motion.

26 The break-down of the 67.6 hours billed for the appeal action is as follows: 54.9 hours
27 attorney time, 10 hours law clerk time and 2.7 hours administrative time. This action was not so
28

1 complicated or difficult to justify 67.6 hours. The hours billed are well over the upper limit
2 of the standard twenty to forty hour range. The 54.9 attorney hours alone are beyond this range.

3 This order finds that forty hours was the time this case deserved. These hours will
4 be attributed completely to attorney work because the attorney work exceeded forty hours.
5 Moreover, defendant's argument regarding unbillable clerical tasks is now moot because
6 the attorney work was largely free of clerical tasks. The majority of the clerical tasks were
7 billed by the law clerk, whose hours will not be billed for the appeal action.

8 The attorney's fees will be calculated by adjusting the total hours down to forty.
9 As stated previously, 54.9 attorney hours were billed for the appeal action (47.3 attorney hours
10 in 2011 and 7.6 attorney hours in 2012). This order adjusts the total hours to 35 hours for 2011
11 and five hours for 2012, which is fairly consistent with how the hours were billed in each year.
12 The attorney's fees award for the appeal action, as adjusted, is as follows: \$6,320.65 for 2011
13 (35 hours at \$180.59/hour) and \$918.65 for 2012 (five hours at \$183.73/ hour).

14 Additionally, plaintiff is entitled to attorney's fees for the instant motion. This order
15 finds the attorney's fees for the instant motion to be \$825.36 (six law clerk hours at \$110 and
16 .9 attorney hours at \$183.73). The .3 administrative hours billed by the law clerk is excluded
17 as clerical work.

18 Plaintiff is also entitled to \$2.36 in expenses for postage. *Int'l Woodworkers of Am.,*
19 *AFL-CIO, Local 3-98 v. Donovan*, 792 F.2d 762, 767 (9th Cir. 1985). Accordingly, plaintiff is
20 awarded \$8,064.66 in attorney's fees and \$2.36 in expenses.

21 CONCLUSION

22 For the reasons mentioned above, plaintiff's motion is **GRANTED IN PART** with respect to
23 \$8,064.66 in attorney's fees and \$2.36 in expenses and **DENIED IN PART** with respect to the
24 remainder of plaintiff's request. Defendant shall pay the award amount directly to plaintiff.

25 **IT IS SO ORDERED.**

26
27 Dated: December 6, 2012.

28 
WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE